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CITATION

Case:

Georgia v. *South Carolina*, 257 U.S. 516, 259 U.S. 572 ..... 2, 3, 5

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 107

450 ACRES OF LAND, MORE OR LESS, KNOWN AS BARNWELL ISLAND, SITUATE IN CHATHAM COUNTY, GEORGIA, AND E. B. PINCKNEY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

While the district court did not write an opinion it expressed its views in an "Order" dismissing the Government's complaint (Pet. 9) and a "Judgment" adverse to the Government's motion for a new trial (Pet. 9-14). The opinion of the court of appeals (Pet. 15-21) is reported at 220 F. 2d 353.

JURISDICTION

The judgment of the court of appeals was entered March 22, 1955. Petition for rehearing was denied April 19, 1955 (Pet. 25). The petition for a writ of certiorari was filed May 28, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether, on the evidence, the district court erred in finding that South Carolina had exercised dominion and sovereignty over the land condemned in this proceeding and that Georgia had acquiesced therein.

STATEMENT

The facts of this case may be summarized as follows:

On April 28, 1787, commissioners appointed by South Carolina and Georgia pursuant to Article VI of the Articles of Confederation entered into what has become known as the Beaufort Convention. Article I of the Convention provided that the boundary between the two States should be the most northern branch of the Savannah River from the sea to the junction of the Seneca and Tugaloo Rivers and thence along the most northern branch of the Tugaloo "*reserving all the islands in the said rivers Savannah and Tugalo* [sic] *to Georgia.*"[1] In the early part of the present century, boundary dis-

[1] The pertinent provision of the Beaufort Convention is quoted in *Georgia* v. *South Carolina*, 257 U.S. 516, at p. 519. The emphasis in this quotation—and in all subsequent ones—has been supplied.

putes arose between the two States. One of these was as to the ownership of islands in the Chattooga River, a westerly offshoot of the Tugaloo unknown when the Convention was executed. Georgia filed —and won—an original suit in this Court against South Carolina. *Georgia* v. *South Carolina,* 257 U. S. 516. This Court concluded (p. 523): "That islands in the Chattooga River are reserved to Georgia *as completely as are those in the Savannah or Tugaloo rivers.*" Accordingly the decree of June 5, 1922 (259 U. S. 572), provided: "That all islands formed by nature in the Chattooga river are reserved to Georgia *as completely as are those in the Savannah and Tugaloo rivers.*"

On December 11, 1952, the Government filed a petition in condemnation (R. 1-4) in the District Court for the Southern District of Georgia seeking a perpetual easement to dump dredgings from the Savannah harbor on about 450 acres of unimproved land, originally an island in the Savannah River but for a long time artificially connected with the South Carolina shore. Among those listed as "having or claiming an interest in the property" was petitioner, E. B. Pinckney, who claimed title to the land through a deed from the Forfeited Land Commission of Beaufort County, South Carolina.[2] He moved to dismiss on the ground the land lay in South Carolina (R. 6-10).

In support of the motion petitioners submitted the affidavit of J. E. McTeer, Sheriff of Beaufort

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[2] This deed was not placed in evidence.

County, South Carolina, since 1926 (R. 71-74). It states that on many occasions during the period of the Eighteenth Amendment McTeer went on the land and destroyed stills and that twice, once in 1932 and again in 1946, he took from the City of Savannah—with the assistance of its police—persons who had committed crimes on the land in question and delivered them for trials in South Carolina where they were convicted and sentenced to the penitentiary.

The affidavit also states (R. 72) that on October 6, 1935, McTeer "went upon this land and seized same, taking exclusive possession thereof in the name of the County of Beaufort and State of South Carolina, upon a warrant of Execution for non-payment [sic] of taxes assessed against same"; that to satisfy the execution the land was sold on sales day of February 1936 to the Forfeited Land Commission of Beaufort County and that on January 6, 1942, that Commission deeded the land to E. B. Pinckney.

Following a hearing (R. 11-30) the district court dismissed the proceedings for want of jurisdiction (R. 32-33). In its "judgment" (R. 65-70) the court expressed the view that while Georgia acquired title to the property at the Beaufort Convention the land was now in South Carolina by virtue of the principle of prescription and acquiescence.

When the Government moved for a new trial the State of Georgia intervened (R. 33-36). The dis-

trict court denied the motion for a new trial (R. 75) and the Government appealed (R. 88).

The Court of Appeals for the Fifth Circuit reversed and remanded the proceeding on the ground that it was properly brought in the district court for the southern district of Georgia (Pet. 15-21).

ARGUMENT

This Court has indicated that islands in the Savannah River, such as the land in question, are in Georgia. *Georgia* v. *South Carolina*, 257 U. S. 516. Nothing occurring since then has altered the situation. There is no warrant for petitioner's contention (Pet. 4) that the record shows acquiescence by Georgia in the exercise by South Carolina of "dominion and sovereignty" over the land. As the court below said (Pet. 20): "South Carolina has not claimed jurisdiction over the land in controversy. It has not been shown that the taxes, for which the land was sold to the Forfeited Land Commission of Beaufort County, and by it to Pinckney, were imposed by the State or applied to the benefit of the State. Of little weight also are the acts of the sheriff and others on which appellee relies as showing that South Carolina asserted dominion and jurisdiction over the tract in question. There is no proof here that Georgia had knowledge of, much less that it acquiesced in, these isolated activities * * *."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

SIMON E. SOBELOFF,
Solicitor General.

PERRY W. MORTON,
Assistant Attorney General.

JOHN F. COTTER,
EDMUND B. CLARK,
Attorneys.

JUNE 1955.

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UNITED STATES OF AMERICA, ET AL., Respondents

ON THE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF
FOR THE STATE OF GEORGIA
IN OPPOSITION

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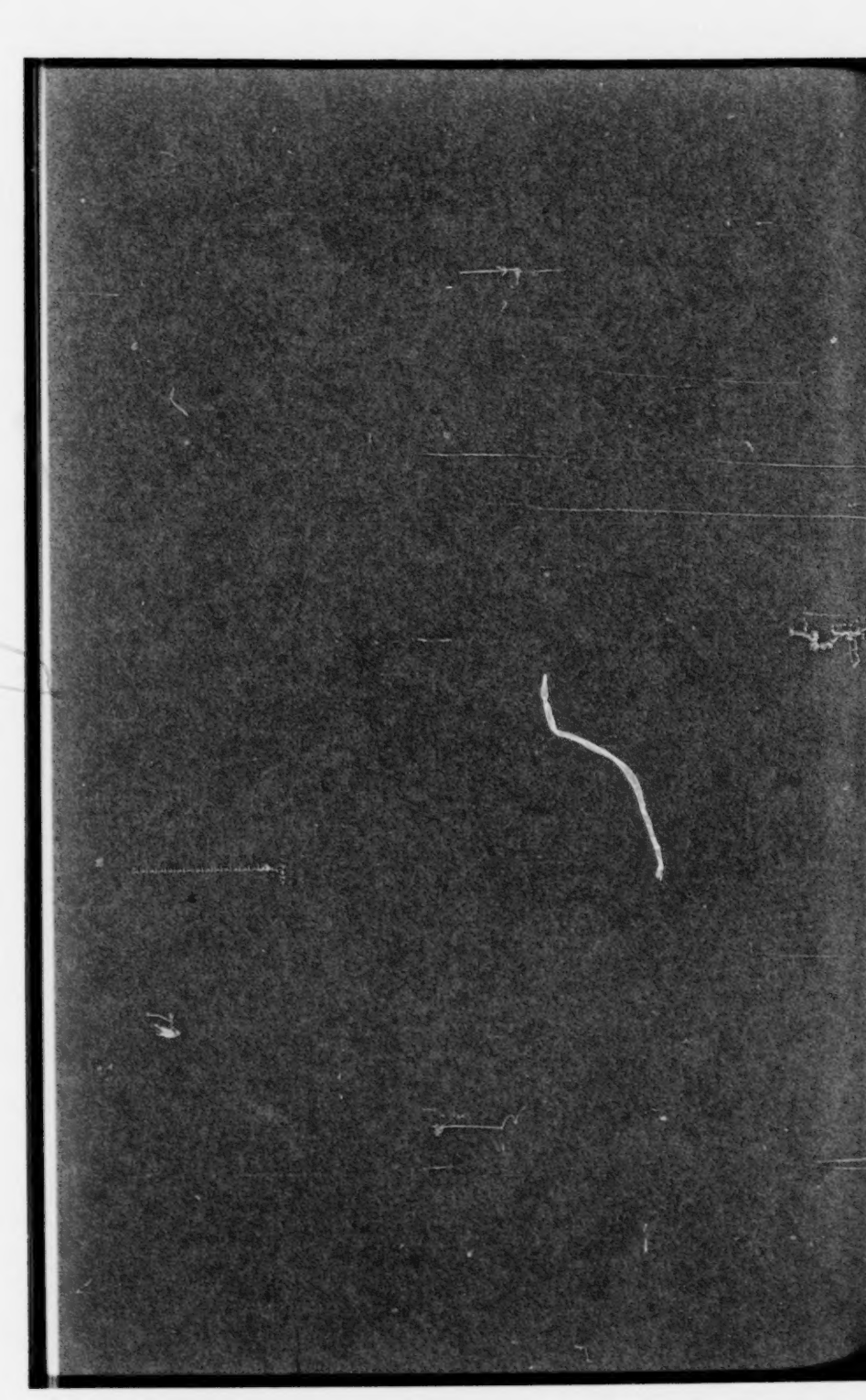
SUPPLEMENTAL TO THE BRIEF FOR THE UNITED STATES



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IN OPPOSITION

Opinions Below

The "judgment" of the district court dated October 28, 1953, as printed in the Appendix to the Petition does not contain the exhibit referred to therein as "hereto attached" (Pet. 11). Since the intention of the district court to incorporate this affidavit into its judgment is manifest this respondent prints said exhibit in the Appendix hereto on page 10 hereof.

The Question Presented

The State submits that the question presented to the court is correctly stated as follows:

"Whether, on a plea to the jurisdiction, the evidence required that the district court apply the principles of prescription and acquiescence in determining the boundary line between the states of Georgia and South Carolina."

The Statutes Involved

The State cites the following statutes (and a convention between the states of Georgia and South Carolina) as pertinent under Supreme Court Rule 23 (d).

28 U.S.C., sec. 1403, provides:

"Proceedings to condemn real estate for the use of the United States or its departments or agencies shall be brought in the district court of the district where the land is located . . ."

The State cites as the specific authority for the taking the Act of Congress (Rivers and Harbors Act) approved August 8, 1917, c. 49, Par. 9; 40 Stat. 267; 33 U.S.C. 593, which states:

> "Whenever any State, or any reclamation, flood control or drainage district, or other public agency created by any State, shall undertake to secure any land or easement therein, needed in connection with a work of river and harbor improvement duly authorized by Congress for the purpose of conveying the same to the United States free of cost, and shall be unable for any reason to obtain the same by purchase and acquire a valid title thereto, the Secretary of War may, in his discretion,

> cause proceedings to be instituted in the name of the United States for the acquirement by condemnation of said land or easement, and it shall be the duty of the Attorney General of the United States to institute and conduct such proceedings upon the request of the Secretary of War; *Provided*, that all expenses of said proceedings and any award that may be made thereunder shall be paid by such State, or reclamation, flood control or drainage district, or other public agency as aforesaid, to secure which payment the Secretary of War may require such State (etc.) to execute a proper bond in such amount as he may deem necessary before said proceedings are commenced."

The State cites the "Convention between South Carolina and Georgia concluded at Beaufort, 1787" and known as the * Beaufort Convention (Hotchkiss' Statute Law of Georgia and State Papers, 1845, Appendix, page 915), which states that the Commissioners, in "establishing and permanently fixing a boundary" between the said states, have agreed (Artle 1):

> "reserving all islands in the said rivers Savannah and Tugalo to Georgia."

Statement

This is a case in which the State of Georgia voluntarily submitted to the jurisdiction of the District Court for the Southern District of Georgia its claim of sovereignty over certain lands known as Barnwell Island, ** now or formerly an

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* Quoted and confirmed in *Georgia v. South Carolina*, 257 U. S. 516 at page 519.

** A witness for Mr. Pinckney testified (R. 181: "there is a little stream there in high water, but in low water you can walk right across it."

island or islands in the Savannah river and its claim of proprietary right therein as ungranted land (R. 33, 34 & 35).

It did this by intervention in support of a motion for a new trial made by the United States in a suit for the condemnation of a permanent easement therein for spoilage use by the U. S. Corps of Engineers.

The evidence in the district court showed (R. 78) that the lands had been subjected to governmental use in connection with river and harbor improvement as early as the year 1883, in which year dams erected by the U. S. Corps of Engineers aggregating 1,200 feet in length, were closed, thereby connecting said lands (then islands in the Savannah River) to the South Carolina shore. There is no evidence that the land has been improved by anyone other than the U. S. Corps of Engineers.

In the condemnation suit filed in the district court, the State of Georgia, the State of South Carolina, certain officials of both states, E. B. Pinckney of Savannah, Georgia, and other individuals, addresses unknown, were cited to appear. (R. 2).

The only defendant to make appearance was E. B. Pinckney who moved the court to dismiss the action on the ground that the lands involved were in the State of South Carolina and therefore without the jurisdiction of the court (R. 8).

The comment of the court was as follows (R. 12):

". . . We are not deciding any boundary lines between the states. There is a tract of land out there in the river and the District Attorney says that the State of Georgia owns it and the suit should be brought here in this court. The other side

says it belongs to South Carolina and that the suit should be brought over there. Now, what difference does it make? The government is going to take the property and they are going to pay the owner."

Counsel for Mr. Pinckney stated he wanted the land condemned in South Carolina as "a matter of convenience," (R. 12), since the government was condemning about 6,000 adjoining acres in a proceeding in Charleston, South Carolina, and he represented all the owners. The court seemed impressed (R. 20, 30, 33, 66) by the desirability, thus presented, for a consolidation of the suits.

The court then heard evidence to the effect that Mr. Pinckney claimed to have paid taxes on the land to Beaufort County, South Carolina, and that the land was now joined to the South Carolina mainland. The District Attorney read into the record the pertinent part of the Beaufort Convention (R. 29) and later (R. 76) introduced sundry maps.

The court then ruled (R. 30):

". . . I still don't see any necessity of this case. The government is going to take the property and pay for it, whether it is in Georgia or in South Carolina. I am going to decide with South Carolina. You can take your order."

The Attorney General of the State of Georgia, being informed of this outcome, joined by intervention with the United States in a motion for a new trial, submitting the claims of the State of Georgia to the jurisdiction of the court and thus, perhaps, removing the element of triviality ("much ado about nothing" R. 33) which the court had so far found the jurisdictional question invested with.

Its intervention was granted (R. 36).

Subsequent to this intervention affidavit evidence was informally submitted (R. 82) to the court by Mr. Pinckney and later confirmed by stipulation to which the State was not a party (R. 86), which attempted to make a showing of prescriptive right on behalf of the State of South Carolina in the lands here involved and of acquiescence on the part of the State of Georgia in the assertion of such rights. Without further hearing, the district court by a judgment dated October 28, 1953 (R. 65; Pet. 9) held that this showing of prescriptive right and of acquiescence was sufficient for it to declare Georgia divested of its sovereignty.

Upon appeal the court below found (Pet. 21) "There is, there can be, no doubt that the land here involved is in the State of Georgia," and that therefore condemnation proceedings had been properly brought and erroneously dismissed.

The petition for certiorari asks the Supreme Court to review that finding.

Argument

Since the lower court refers (Pet. 18) to the affidavit of the sheriff of Beaufort County as "the only identifiable evidence to which the trial judge referred," in applying the principles of prescription and acquiescence to this case, the State of Georgia submits that it is of paramount interest to examine that affidavit for its sufficiency as evidence of South Carolina's assertion of dominion, and of Georgia's acquiescence in the loss of its sovereignty, over the lands involved.

For unless the Supreme Court finds in that affidavit, or

elsewhere in the record, a sufficient basis for the application of the principles of prescription and acquiescence to this case, the petition for certiorari makes out no case for a hearing.

The State submits that the facts averred in the affidavit are of astonishing frailty as a foundation for the application of the principles invoked.

Sheriff McTeer's affidavit states (Appendix, p. 10) that from the time of his induction into office in 1926 until the repeal of the Volstead Act (December of 1933), which is to say for a period of some six or seven years, he had "gone upon the land in search of law violators and has there destroyed numerous distilleries." He does not state that he did so with notice to or knowledge upon the part of *any* officer of the State of Georgia. This allegation, therefore, completely fails as a showing of acquiescence on the part of anyone.

Sheriff McTeer's affidavit further states (p. 11) that several years later (in 1935), together with a deputy of his office, he "went upon this land and seized same," taking possession thereof in the name of the County of Beaufort and State of South Carolina, upon a warrant of execution for non-payment of taxes against same, and that the lands were sold, first to the Forfeited Land Commission of South Carolina and, subsequently, to claimant * E. B. Pinckney. Again, there is no allegation that this, or any of this, was with the knowledge of, much less the acquiescence by, any official of the State of Georgia.

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* (This is the only evidence before the trial court other than claimant Pinckney's own statement that he has paid taxes on the land, that claimant Pinckney has anything even purporting to be color of title to Barnwell Island).

We then come to the part of the affidavit (p. 11) which apparently *attempts* to make a showing of "acquiescence"—of a sort. Two instances are recited of the arrest *by unnamed police officers of the City of Savannah*, of individuals for whom the deponent had sworn out warrants in South Carolina for crimes which deponent says were committed on Barnwell Island, the first crime being for the shooting of claimant E. B. Pinckney there (this was ten years *before* Pinckney claims to have had color of title) and the second for stealing claimant Pinckney's hogs from the island (four years *after* he claims color of title).

Since the affidavit is silent on the subject of verbal notice to these unknown policemen whose acquiescence, for and on behalf of the State, is to change its boundaries and divest it of its proprietory rights, we must turn to the warrents to determine if *they* give any notice that the crimes had been committed on the lands known as Barnwell Island, or, for that matter, (assuming a familiarity with the terms of the Beaufort Convention on the part of Savannah policemen) on any islands (now or formerly) in the Savannah River. A copy of the warrat for the arrest of the men who were subsequently convicted of having shot claimant Pinckney appears on Record page 58. It states that the crime was committed "in Beaufort County in the State aforesaid" (South Carolina). Nothing more as to locale. The warrent for the arrest of the (convicted) thieves of claimant Pinckney's hogs appears on Record page 61. It recites that the crime was committed "in the State aforesaid" (South Carolina). Nothing more.

Upon analysis, therefore, this affidavit of Sheriff McTeer's, with its collateral documents, cited by the trial judge as the principal evidence supporting his application of the principles

of "prescription and acquiescence in determining the boundary lines between the States" is totally devoid of any showing of "acquiescence" on the part of Georgia, and as for prescription, the affidavit fails to show that *South Carolina* had ever asserted any claim to the lands, but merely shows that both the Sheriff and Mr. Pinckney had performed certain acts on the presumption that the land was in South Carolina.

The court below ruled that the evidence before the district court failed to make out a case for the application of the principles invoked, citing *Arkansas v. Tennessee*, 310 U.S. 563, 60 S. Ct. 1026, 84 L.Ed. 1362; also *Missouri v. Kentucky*, 11 Wall 395, 402-403, to the effect that the principles of prescription and acquiescence are applicable in re-establishing the boundaries between states when, and only when, supported by a sufficient basis of facts.

Conclusion

There is no error in this decision of the Circuit Court of Appeals, and nothing appears in the petition and brief of petitioners for certiorari to induce this Court to exercise its jurisdiction in the matter.

Respectfully submitted,
STATE OF GEORGIA
EUGENE COOK, Attorney General

By *Thomas H. Gignilliat*
Deputy Assistant Attorney General
Counsel, Savannah District Authority

APPENDIX

EXHIBIT "A"

(attached to the judgment of the district court dated Oct. 28, 1953)

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

AFFIDAVIT

Personally appeared before me J. E. McTeer who, upon being duly sworn, says:

1. That he is, and for many years has been, the duly elected and qualified Sheriff of the County of Beaufort, in the State of South Carolina having first entered into the duties of such office on the 16th day of February, 1926 and having served continuously from such time until today as such officer.

2. That he is familiar with a tract of land, formerly in the County of Beaufort, now in the County of Jasper since 1950 by Act of the South Carolina Legislature, commonly known as "Barnwell Island."

3. That from the 16th day of February, 1926 aforesaid, when deponent first entered into the duties of the office of Sheriff aforesaid, he exercised the duties of such office upon this land. That during the period of time when the Volstead Act was effective this land was a notorious site for the manufacturing of illegal whiskey and on many occasions dating back to the first year of his office, he has gone upon this land in search of law violators and has there destroyed numerous illegal distilleries.

4. That to his knowledge this tract, though termed "Barn-

well Island," has not been an island in the true meaning of the word since 1926, that prior thereto he had no knowledge of the tract.

5. That on the 6th day of October, 1935 deponent, together with a deputy of his office, went upon this land and seized same, taking exclusive possession thereof in the name of the County of Beaufort and State of South Carolina, upon a warrant of Execution for non payment of taxes assessed against same; that thereafter on the sales day of February, 1936, the said tract was sold before the Court House door at Beaufort County Court House, Beaufort, South Carolina to satisfy such execution; the high bidder at such sale being the Forfeited Land Commission of Beaufort County, South Carolina.

6. That thereafter on the 16th day of February 1940 deponent executed a deed of this tract to the said Forfeited Land Commission; and that on the 6th day of January 1942 he, together with other members of the said Forfeited Land Commission executed a deed of this tract to E. B. Pinckney.

7. That shortly after the 23rd day of June, 1932, deponent was notified that E. B. Pinckney had been shot on Barnwell Island; that deponent, together with deputies of his office, went to this tract of land in an effort to find out who had shot Pinckney; that his investigation revealed that Louis Williams and Willie Warring were the persons who had shot Pinckney and that these persons resided in the City of Savannah, Georgia; that as a result of this investigation deponent advised E. B. Pinckney to appear before Magistrate J. F. Coburn of Yemassee Township, Beaufort County, South Carolina for the purpose of swearing out a warrant for the arrest of these persons; this was done and deponent took such warrant to the officers

of the City of Savannah ,a political subdivision of the state of Georgia, who aided him in apprehending Louis Williams and Willie Warring. That after their arrest, in the City of Savannah, by City Police Officers, Louis Williams and Willie Warring confessed their crime, waived extradition and were removed to the Beaufort County Jail by deponent. That subsequently on the 28th day of November, 1932, in the presence of deponent, these defendants plead guilty in open Court, before His Honor M. M. Mann, Presiding Judge of the 14th Judicial Circuit at Beaufort County Court House, to the crime of Assault and Battery with intent to Kill E. B. Pinckney, and were sentenced by Judge Mann on the same day, as follows:

> The judgment of the law and the sentence of the Court is that you Willie Warring be confined in the State Penitentiary or on the Public Works of Beaufort County for a period of three (3) years AND
>
> The judgment of the law and the sentence of the Court is that you Louis Williams be confined in the State Penitentiary or on the Public Works of Beaufort County for a period of eight (8) years.

3. That on or about the 12th day of March, 1946, deponent received word that hogs had been stolen from E. B. Pinckney on Barnwell Island, that deponent sent his deputy, O. C. Michael, to investigate and as a result warrants were sworn out before Magistrate Cooler of Beaufort County and subsequently Daniel W. Bee and Westley Stobert were arrested by Georgia officers and turned over to deponent in the City of Savannah, Georgia. That these two men, Daniel W. Bee and Westley Strobert, in the presence of deponent plead guilty before His Honor J. Henry Johnson, Presiding Judge of the

14th Judicial Circuit at Beaufort County Court House to the crime of Grand Larceny and were sentenced by Judge Johnson on the 25th day of June, 1946, as follows:

> The judgment of the law and sentence of the Court is that you Westley Strobert and you Daniel W. Bee be confined in the State Penitentiary or on the Public Works of Beaufort County or in the Jail of the said County for a period of eighteen (18) months.

9. That as an officer of the County of Beaufort and of the State of South Carolina he did exercise the powers of his office over the tract of land known as Barnwell Island in every respect with the knowledge, acquiescence and aid of the officers of Georgia from 1926 to 1950 and that no question as to his jurisdiction has ever been raised to his knowledge.

(s) J. E. McTEER,

Sworn to before me this
5th day of May, 1953.
Randolph Murdaugh, Jr. (LS)
Notary Public for South Carolina.
Endorsement
C A 678
Judgment
Filed in office October 30, 1953
Margaret Clarke
Chief Deputy Clerk